IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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A. T. HAMMONS, Superintendent of Banks for the State of Arizona, and J. S. DODSON, Special Deputy Superintendent of Banks for the State of Arizona,

Appellants,

vs.

MARYLAND CASUALTY COMPANY, a Corporation,

Appellee.

No. 5136

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

On the 4th day of October, 1924, the Bank of Winslow, a state bank, was insolvent and on that day the Appellant Hammons, in his official capacity as Superintendent of Banks, and under authority of the Arizona Banking Code, took possession of the bank and its assets. and appointed Appellant Dodson Special Deputy, for the purpose of taking charge of, and liquidating the affairs of the bank. The powers of these officers were such as designated by the banking code, and their relation to the Superior Court of Navajo County, the county of Arizona in which the insolvent bank was doing business, was that similar to receivers appointed by said state court, and subject to the same jurisdiction and authority of said court as if in fact by it appointed receiver in said matter. (Sec. 46, Banking Code, appears on page 225 of Transcript of Record in Assignment of Error No. 11.)

That the Bank of Winslow was a depositary of county funds of the County of Navajo to the stipulated amount of $51,209.75, at the date of its insolvency. Of this amount $15,000.00 was "inactive funds" and the balance "active funds". The inactive funds were in fact funds raised by taxation to retire when due the bonded debts of the county and its school districts. The active funds were funds raised for general county purposes, and in fact, under the "budget law" of the state, consisted of as many different funds as there were county purposes, and in fact distinctly appropriated to specific amounts for each such purpose; this active fund also included money collected by the county for

school district purposes, and which included amounts collected under general county tax levy for school purposes, special district levies for extra expenses of distinct districts, and became subject to warrants drawn for the purposes of each district after the County Superintendent of Schools had officially distributed the gross collections for school purposes, to the particular districts. (The "budget" of Navajo County appears in Transcript on pages 239-257.) So far as the "active funds" were concerned, and in the deposit, these were balances of previous fiscal years, none of the school or other funds collected upon the 1924 tax-rolls, were shown to have been deposited in the Bank of Winslow. (See testimony of Treasurer Schaefer, page 114 of Transcript, that $10,000.00 was available somewhere in some bank for school purposes, and page 117, 118, of transcript, when apportioned to various districts by School Superintendent.) There is an entire lack of evidence of any such apportionment, and it appears that all of the school warrants which are included in the set-off allowance of the decree were registered as against the school funds of special districts, and were warrants drawn for the purposes of only eight out of twenty-five school districts, and with only $10,000.00 collected and available on October 4, 1924, and this not yet apportioned among the twenty-five districts, it would be impossible to say that the registered school warrants, amounting to $6313.38, allowed in the decree as a set-off, were payable out of the gross undistributed $10,000 collected for purposes of all the school districts of the county. The bill alleges

that prior to suit, in negotiations between the county treasurer and defendant Dodson, the bank debt had been partially adjusted to an extent that the remaining debt of the bank to the county was $37,-752.44, and in which settlement certain warrants had been paid, certain bonds been sold by the treasurer of Navajo county, and $7000.00 of these bonds returned to the Receiver Hammons, and in its Bill seeks to have all of the registered warrants, not yet called for redemption, held in status quo, and the $7000.00 of bonds also so held, until the District Court of the United States could determine the alleged right of plaintiff below to a set-off through subrogation of the amount of such warrants, and upon payment of the remaining balance of its liability as surety, to have delivered to it the $7000.00 of bonds. Asked for and obtained in the District Court an injunction pending final hearing of the suit to the above end and result.

The defendants interposed their motion to dismiss both the original Bill, and again the amended Bill, upon grounds of entire absence of showing of equity, and upon the grounds that the state court through its receiver was actually in control of the assets and directing the matters of a liquidation of the insolvent Bank of Winslow, prior to the Bill, the District Court was without jurisdiction to entertain the Bill, or grant any relief involving those matters and assets. (For motion to dismiss see Transcript, page 38). This motion was overruled. The District Court granted the injunctive relief. Defendants answered, and in that answer and upon the hearing of the cause insisted upon in their de-

fense, and still insist upon that the decree is erroneous for the reasons specified in the various assignments of error, which errors here briefly stated are:

(1) The jurisdiction of the state court having attached to the subject matters and assets involved in this suit prior to the filing of the bill, the District Court was without jurisdiction to grant plaintiff any relief by injunction or otherwise directed to those subject matters and assets.

(2) That the suit is an attempt to enjoin and supervise by injunction proceedings in a state court.

(3) That equity follows the law, and in this case the statutes of the state of Arizona having specifically declared that warrants may in the hands of the original payee be used in payment of debts due the county, and it appearing that the Bank of Winslow acquired its warrants by purchase only, it is urged that neither the general statute of set-offs, nor any theory of equitable set-off can be applied to the relief of Plaintiff.

(4) It being an admitted fact that all of the warrants involved are registered warrants, and that no call had been made for payment of such warrants, the Bank itself, prior to its insolvency could not have demanded payment. and its surety has no greater right through the fact of insolvency than did the bank. The insolvency simply preserves existing rights and equities, but does not create new ones as against the estate of the bank.

(5) There was no showing in the record that

any funds had been apportioned to any of the school districts the warrants of which are used as set-off in the decree, and it would compel the County to divert public funds to purposes, and at times without legal authority, if a set-off be enforced on account of any funds at all in the bank of Winslow at the time of its failure.

(6) There exists no authority in the banking law of the state of Arizona under which a state bank may pledge its assets to secure a surety upon its repositary bond to a county, that the purpose of the depositary bond is to protect the general depositors, and the effect of the decree in this case would be to prefer a surety over the general creditors of the bank, and thus defeat the very purpose of the bond itself.

(7) That the state laws of Arizona control as to the time when and the manner in which registered county warrants are to be paid, and it is urged that the courts cannot advance the time nor change the manner of payment, for the benefit of the holder of any such warrants nor anyone claiming through subrogation or otherwise to the rights of the holder. That the public policy connected with the collection, use, and appropriation of public funds requires that every law regulating the time of use be enforced and not evaded, and persons who take registered warrants take them subject to the law, and without equities in their favor contrary thereto, and in this case the set-off allowed in the decree evades and is contrary to the laws of the state.

ARGUMENT AND CITATION OF AUTHORITIES.

Appellant urges as assignment No. 1, that the Court erred in overruling the motion of Appellants to dismiss the complaint for the jurisdictional reason that the state Court and its receiver had obtained and was exercising jurisdiction over the assets and property of the insolvent bank, prior to this suit, all as appears in the assignment itself on page 223 of Transcript of Record.

The facts which support this motion appear in the amended Bill itself, as well as in the original Bill. Those facts, with reference to the Bill, are and appear as follows:—

(A) The Maryland Casualty Company became and was surety upon the depositary bond of the Bank of Winslow to the aggregate amount of $40,000.00 prior to insolvency of the bank, and was so liable at the date of insolvency. (Transcript page 2, Bill par. 2.)

(B) That on the 4th day of October, 1924, the Bank of Winslow closed its doors . . was insolvent . . and pursuant to the laws of the State of Arizona, the Defendant A. T. Hammons, Superintendent of Banks took over said bank, and appointed the said Defendant J. S. Dodson, Special Superintendent of Banks his agent to take charge of said bank for the purpose of liquidation, and the said defendant J. S. Dodson, is now and ever since has been, the agent in charge of said bank. (Transcript page 4, Bill par. 3)

(C) It appears from the report of the Defendant Dodson, acting as agent of the State Superintendent of Banks, filed by him in the Superior Court of Navajo County, Arizona, that at the date the said Bank of Winslow suspended payments, the said bank was the holder and owner for value of certain warrants of Defendant, County of Winslowa, as follows: (Here follows a list of warrants so held and reported to the Court). (See Transcript page 5, Par. 5 of Bill.)

(D) It appears that Defendant Dodson at the time of filing the Bill of complaint, was holding as assets of the insolvent bank not only all the registered warrants of Navajo County, but $7000.00 of improvement Bonds of Town of Winslow, latter obtained from the County treasurer of Navajo County, after a partial adjustment of the relations between the county and the bank. (See Transcript page 9, Par. 7 of Bill.)

(E) It appears from the Bill that the above bonds, and registered warrants held by Defendants for the benefit of the trust estate of the bank, (Transcript page 9.) and fairly construed the only threatened action of the Defendants was an intent to convert said bonds and warrants into cash, for the benefit of the trust estate of the Bank.

(F) There was no allegation whatever as to what other assets over and above $23,691.60 of registered warrants, and the $7000.00 of improvement bonds of Town of Winslow, were held by the Defendants as *quasi* receivers of the bank. If these were all the assets then the Bill of complaint, with

the injunction granted thereon, operated as an injunction restraining proceedings in the state court, by absolutely restraining all further power of the Superintendent of Banks directed to any further liquidation of the affairs of the insolvent bank. If those were not all the assets, then the injunctive relief granted by the district court, operated to that extent, to enjoin and restrain the liquidation of those assets under the authority of the state court.

The motion to dismiss the Bill for want of jurisdiction was of course directed to matters of allegations appearing upon the face of the Bill. Admissions by Plaintiff in the Bill as to existing facts. Appellants urge that these admissions, so appearing were sufficient to defeat the jurisdiction of the District Court, under the rule of the cases applicable to such a state of facts that:—

> "The law is well settled, that the Court which first acquires jurisdiction over the *res* will hold it to the exclusion of all other courts. The rule applies to suits to enforce liens against specific property, to marshal assets, administer trusts, liquidate insolvent estates, etc."
>
> Mace v. Mayfield 10 Federal (2nd Ed.) 231, citing Covell v. Heyman, 111 U. S. 176.

Other cases in which the same rule has been applied are, in part as follows:—

> Heidritter v. Elizabeth Oil Cloth Co. 112 U. S. 294, at page 305.
>
> McKinney v. Langdon 209 Fed. 330.

Dickenson v. Willis 239 Fed. 171 at page 174.

Wabash Railroad Co. v. Adelbert Collegs 208 U. S. 38.

Murphy v. John Hoffman Company, 211 U. S. 562.

In re Bologh, 185 Fed. 825.

These cases do not by any means exhaust the cases, but appear to be leading cases, wherein many more cases are cited to the same effect and rule of comity.

The only possible question in connection with an application of the rule of comity as between state and federal courts, as announced in above cases, is as to whether as a matter of fact and law, the Superior Court of Navajo County Arizona had been given through statutory provisions, or by procedure therein, jurisdiction of the assets and matters connected with the liquidation of the insolvent bank of Winslow.

Under the constitution of the state of Arizona, its superior courts are vested with jurisdiction:—

> "In all cases of equity and in all cases of law which involve the title to, or the possession of real property, . . . and in all other cases in which the demand or value of the property in controversy amount to two hundred dollars exclusive of interest and costs . . . The superior Court shall also have original jurisdiction in all cases and of all proceedings in which juris-

diction shall not have been vested exclusively in some other court."

Arizona Const. Art. VI Sec. 6.

As applied to the present case, the legislature of the State of Arizona, at its special session in 1922, (Session Laws S. S. 1922 Secs. forty-four, forty-five, and forty-six, and Forty-nine,) did provide for jurisdiction in its superior Courts, and define the relations of the Superintendent of Banks thereto, in cases of insolvent banks, as follows:—

"METHOD OF LIQUIDATION OR REORGANIZATION. Whenever it shall appear to the Superintendent of Banks that any bank has violated the provisions of its articles of incorporation or any law of this state, or is conducting its business in an unsafe or unauthorized manner, or if the capital of any bank is impaired, or if any bank shall refuse to submit its books, papers and concerns to the inspection of any examiner, or if any officer thereof shall refuse to be examined upon oath touching the concerns of any such bank or if any bank shall suspend payment of its obligations, or if from any examination or report provided for by this Act the Superintendent of Banks shall have reason to conclude that such bank is in an unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe and inexpedient for it to continue business, the Superintendent of Banks may forthwith take possession of the property and business of such bank and retain

such possession until such bank shall resume business, or its affairs be finally liquidated as herein provided.

On taking possession of the property of any bank, the Superintendent of Banks shall notify the Governor and the Attorney General in writing of his action and shall forthwith give notice of such fact to all banks, trust companies and individuals or firms holding or in possession of its assets. No bank, trust company, savings bank, firm or individual, knowing of such taking possession by the Superintendent of Banks or notified as aforesaid, shall have a lien or charge for any payment, advance or clearance thereafter made, or liability thereafter incurred, against any of its assets. Such bank, may with the consent of the Superintendent of Banks, resume business upon such conditions as may be approved by him. Whenever any such bank, of whose property and business the Superintendent of Banks, has taken as aforesaid, deems itself aggrieved thereby, it may at any time within ten days days after taking such possession apply to the Superior Court of the County in which such bank is located to enjoin further proceedings; and said court after notifying the Superintendent of Banks to show cause why further proceedings should not be enjoined and after hearing the allegations and proof of the parties and determining the facts, may upon the merits, dismiss such applications or enjoin the Superintendent of Banks, from further pro-

ceeding and direct him to surrender such business and property to such bank."

"ASSETS OF INSOLVENT BANKS VESTED IN SUPERINTENDENT OF BANKS. Upon taking charge of the property and business of such bank, the Superintendent of Banks shall forthwith be vested at law and in equity with the sole, exclusive and unconditional ownership and title in himself, his successors in office and assigns, of all of the property and assets of said bank, whether the same are situated within this State or elsewhere, such ownership and title in the Superintendent of Banks to be free and unaffected by any levy, judgment, attachment or other lien obtained thereafter as against the property of said bank through legal proceedings and free from and unaffected by any equity arising in favor of or obtained by third persons after the Superintendent of Banks has taken charge, as aforesaid, but subject to any and all equities in favor of third persons which have arisen or been obtained as against any of said property or assets prior to the taking charge thereof by said Superintendent of Banks; and with respect to the property and assets of any bank in his hands and unadministered upon at the date when this amendment takes effect, such title and ownership of the Superintendent of Banks shall relate back and be deemed to have vested in him as of the date when he took charge of the business of any such bank. All levies, judgment, attachments, or other liens,

obtained through legal or equitable proceedings in this State or elsewhere, as against any bank organized under the laws of this State, at any time within thirty days prior to the taking charge by the Superintendent of Banks of the property and affairs of said Bank, shall be null and void in case the Superintendent of Banks takes charge of its property and affairs, and the property affected by such levy, judgment, attachment or other liens so obtained obtained shall be forthwith wholly discharged and released from the same, and shall pass to the Superintendent of Banks as a part of the estate of said bank; provided that nothing herein contained shall have effect to destroy or impair the title obtained by such levy, judgment, attachment or other lien, of a bona fide purchaser for value who shall have acquired the same without notice of reasonable cause for inquiry. Upon taking possession of the property and business of any bank the Superintendent of Banks is authorized to collect money due it, and to do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate the affairs thereof as hereinafter provided. The Superintendent of Banks shall collect all debts due and claims belonging to it, and for such purposes is authorized to institute, maintain and defend suits and other proceedings in this State and elsewhere, and upon the order of the Superior Court of the county in which it is doing business, may sell or compound all bad or doubtful debts, and on like order may sell all its real and

personal property on such terms and at public or private sale, as the court shall direct, and if necessary to enforce in this State or elsewhere the liabilities of its stockholders.

"POWERS OF SUPERIOR COURT. The Superior Court shall have the power to make orders for sale of the property and assets of the bank, real, personal and mixed, and orders confirming such sales; and all orders made prior to the date of the adoption and approval of this amendment, by the Superior Court of this State authorizing or confirming sale of the property and assets of banks administered therein shall be and hereby are validated."

"RELATIONS OF COURT AND SUPERINTENDENT OF BANKS WHEN ACTING AS LIQUIDATING AGENT. When the affairs of any bank have come into the hands of the Superintendent of Banks for liquidation the relations between the Superior Court and the Superintendent of Banks shall be the same as the relations of the Superior Court and a receiver under the laws now existing, and the Superior Court shall have the same authority and jurisdiction over the Superintendent of Banks in such matters of liquidation as it would over receivers appointed by the court, unless in this Act otherwise provided."

"Section 49. SUPERINTENDENT OF BANKS TO MAKE RETURN OF INVENTORY. Upon taking possession of the property and assets of such bank, the Superinten-

dent of Banks shall make an inventory of the assets in duplicate, one to be filed in the office of the Superintendent of Banks, and one in the office of the Clerk of the Superior Court in the County in which the said institution was doing business, and the Clerk of said Court shall give such case a number on the Superior Court Docket etc."

(It appears in the transcript that the above provisions was followed, that the case was docketed and still pending in the Superior Court of Navajo County. Testimony of Miss Tandy, pages 141-142 of Transcript.)

The Federal Court in New York in passing upon the question of a conflict of jurisdiction between the state and federal court which arose in connection with the Superintendent of Banks in that state and over the matters and assets of an insolvent bank, under a statute almost identical with the Arizona statute, says:—

"The Superintendent of banks in taking charge of a banking institution does so by virtue of his authority as such superintendent under the statute, and not as the result of any proceeding in court. His authority is somewhat analygous to that of a receiver of a National bank appointed by the Comptroller of the Currency. Section 19, of the banking code, however, provides that the administration in certain respects shall be subject to the action of the Supreme Court of the State of New York.

"It does not seem necessary or proper for this Court to pass upon these questions of priority because I think the determination of these questions is vested by law in the Supreme Court of the State of New York. The provisions in Section 19 of the banking law that the dividends to be declared by the Superintendent of Banks are "to be paid to such persons and in such amounts and upon such notice as may be directed by the Supreme Court in the Judicial District in which the corporation or individual banker is located" in my opinion confers upon the New York Supreme Court the sole power of determining what creditors of the trust company are entitled to preference and what amounts shall be paid them as dividends."

In re Bologh 185 Fed 825.

The following language of Mr. Justice Mathews, in Heiritter v. Elizabeth Oil Cloth Co., 112 U. S. 305, 5 Sup. Ct. Rep. 135, expresses fully by view upon this point: ("It is merely an application of the familiar and necessary rule, so often applied, which governs the relation of court of concurrent jurisdiction, where as in the case here, it concerns those of a state and of the United States, constituted by the authority of district governments, though exercising jurisdiction over the same territory. That rule has no reference to the supremacy of one tribunal over another; nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. It simply requires, as a matter

of necessity, and therefore, of comity, that when the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it, for the purposes of its jurisdiction."

Heidritter v. Elizabeth Oil Cloth Co. 112 U. S. 305

The rule in respect to the jurisdiction of a receivership court which obtains prior possession of the property was well set forth in the case of McKinney v. Landon, 209 Fed. 300 where Judge Hook said: "The action in the state court was begun first, but the federal court first appointed receivers. Did the subsequent appointment of receivers by the state court relate back so that it may be said that it was in constructiove possession of the property from the time the action was commenced? It is a maxim of the law that a court having possession of property can not be deprived thereof until its jurisdiction is surrendered or exhausted, and that no other court has a right to interfere. It is a principle of right and of law which leaves nothing to the discretion of another court and may not be varied to suit the convenience of litigants. Merritt v. American Steel Range Co., 24 C. C. A. 530, 79 Fed. 228. It is essential to the dignity and authority of every judicial tribunal and is especially valuable for the prevention of unseemly conflicts between federal courts and the courts of

the states. As between them it is reciprocally operative—mutually protective and prohibitive. The most difficulty arises in determining when possession of property has been taken, when jurisdiction has attached to the exclusion or postponement of that of other courts. It is settled, however, that actual sizure or possession is not essential, according to that jurisdiction may be acquired by acts which, according to established precedure, stand for dominion and in effect subject the property to judicial control. It may be by the mere commencement of an action the object, or one of the objects of which is to control, affect, or direct its disposition. See Mound City Co. v. Castleman, 110 C. C. A. 55 187 Fed. 121, and the cases cited. The principle often applies "where suits are brought to enforce liens against specific property to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected.' Farmers' Loan & Trust Co. vs Railroad, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. The mere fact that an exigency calling for a receiver may arise does not make the jurisdiction of the court in that respect relate to the beginning of the action (Shields v. Coleman, 157 U. S. 168, 178 15 Sup. Ct. 570, 39 L. Ed. 660) as perhaps where it is an ordinary aid to execution on a final judgment and dependent upon conditions or circumstances that may or may not occur.

But where the declared purpose of an action in whole or in part is directed to specific property, and the full accomplishment thereof may require judicial dominion and control, jurisdiction of the property attaches at the beginning of the action. And it is so if dominion and control are essential to the action, though not yet exercised. We think enough has been said of the nature of the action in the state court to show that it is within the principle invoked. Judicial dominion of the combined and comingled properties of the offending corporations is vitally necessary to the purposes of the action. In no other way could the marshaling and separation be effectually accomplished.

"It is urged that the jurisdictions of the state and federal courts are not concurrent with respect to the subject-matters of the suits, but in questions like that before us the test is prior possession, actual or constructive, and not concurrency of jurisdiction. The subject matter of which the one court has jurisdiction may be wholly without the power of the other. Prior possession by a court having jurisdiction of the case before it according to the laws of the sovereignty under which it was organized entitled it to hold until it is through."

In the case of Dickenson vs. Willis 239 Fed. 171 we quote the following from the opinion commencing on page 174.

"After a careful study of the cases I am satisfied that the line must be drawn between

those cases which seek to recover a judgment against the receiver in the nature of damages and those cases which involve the possession of the property in the hands of the receiver, or the use of such property or the management thereof—the administration of the property in his hands. As to questions of possession, use, and management, I am satisfied that the appointing court, whether it be state or federal, has exclusive jurisdiction. In 34 Cyc. 416, it is said: 'The rule requiring leave to sue a receiver is sometimes modified by local statutes, and has been changed by act of Congress so far as the court of the United States are concerned, by permitting a receiver appointed by those courts to be sued in another jurisdiction in cases where his act is drawn in question in transactions connected with the property in his hands, arising during the discharge of his duties as such official. Such provision does not authorize the bringing of all actions without limitation, but only such as are of the class mentioned; as to others, leave of court should be obtained. Thus a state providing that a receiver may be sued in respect to any act or transaction in carrying on the business connected with the property intrusted to him does not authorize a suit against the receiver, without leave for the corpus of the estate, and the operation of the federal statute has been restricted in the same manner to causes in respect to acts or transactions of the receiver, and does not limit the power of the court which

appointed the receiver to protect the property in his custody from external attack."

Justice Moody, in Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed 379, says:

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession has acquired, jurisdiction to hear and determine all questions respecting the title, the possession, or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application, and not peculiar to the relations of the courts of the United States to the courts of the states. They are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, per-

sons, and controversies. They are not based upon any supposed superiority of one court over the others but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the states, and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the states of the Union" (Citing many cases.)

In Murphy v. John Hoffman Co., 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327, it is said:

"Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. Wabash R. Co. v. Adelbert College, 208, U. S. 38, 54, 28 Sup. C. R. 182, 52 L. Ed. 379, 386."

Whatever rights the Plaintiff may have had, or has, could and should properly, have been urged in the state court. Presumably, and in the theory upon which the rule of comity is based, those rights would have been fully protected by the state Court.

Appellant urges the point that the Bill is without equity. Just what difference can it possibly make to the Plaintiff, what becomes of the other securities held by the County of Navajo to secure its deposits in the insolvent bank. Or what possible difference can it or could it have made, whether the registered warrants were sold, or presented for payment and paid by the County, when if as a matter of law, or by the rule of subrogation, those bonds and those warrants should pro rate to reduce the liability of Plaintiff as surety. If the county had dissipated or lost its other securities, or was bound to accept its registered warrants as payment upon its bank deposit, it seems quite certain that the Plaintiff could have been relieved of liability to the proper amount, without all the circuity of an injunction suit, the impounding of assets, and the other interference with the actions of the Appellants directed to the liquidation of the assets and affairs of the insolvent bank. The Plaintiff could have refused to pay its liability upon its depositary bond to the county, until the county allowed any proper set off. Appellants have at all times been unable to appreciate why they should be drawn into a suit upon a matter primarily between the county of Navajo and the Plaintiff. And to Appellants the whole proceeding from which the appeal is taken

seems as matter which could have been fully determined in a suit at law, and if so, the suit is without equity, and the Bill should have been dismissed.

Returning to the main argument as to the jurisdiction. If the federal court had jurisdiction to tie up any portion of the assets of the insolvent bank, then it could tie up all the assets, pending a determination of the alleged rights of litigations as to those assets. In this case, the Superintendent of Banks would in the first instance be subject to the orders of the state court, as to how, and to whom he should distribute the assets. By the decree from which he appeals, that Superintendent is ordered to do thus and so, with a portion of the assets. The question is, which order must he obey. If counsel for appellants understand the rule of comity laid down by the cases cited in this brief, the purpose of that rule is to avoid any such conflict and confusion to be attached to the liquidation of the assets of insolvents.

Assignment of error No. II was made and intended to point out to this Court the statutory relations of the Superintendent of Banks to the state court in those cases in which an insolvent bank comes into the hands of that officer. The statute already quoted in full in connection with Assignment No. 1, says that "when the affairs of any bank have come into the hands of the Superintendent of Banks for liquidation the relations between the Superior Court and the Superintendent of Banks shall be the same as the relations of the Superior Court and a receiver under the laws now existing,

and the Superior Court shall have the same authority and jurisdiction over the Superintendent of Banks in such matters as it would over receivers appointed by the Court, unless in this act otherwise provided."

A reading of the above provision confirms the position that the Superintendent of Banks becomes a statutory receiver, from the time that officer takes possession of the affairs of an insolvent bank for the purposes of liquidation. The Bill in this case in Paragraph 3, page 4 of Transcript alleges and thus admits the possession for the purposes of liquidation, and that being so the jurisdiction of the state court attached to the property and affairs of the insolvent bank without any further act.

The Arizona Supreme Court has construed the above provision according to its plain reading, in

Hammons v. Grant, 225 Pac. 485.

In the Bolough case, 185 Fed. 825 above quoted the Court says:— The provisions of Sec. 19 of the banking law . . confers upon the New York Supreme Court the sole power to determine what creditors of the trust Company are entitled to preferences and what amounts shall be paid to them in dividends."

The fundamental principle involved in this case is that the Legislature of the state of Arizona has provided a procedure for the winding up of the affairs of insolvent state banks therein. It has vested judicial jurisdiction of matters connected with such liquidations, in the Superior Courts of the county in which the insolvent bank has its place

of business. The control of the state court is thus made complete and exclusive as to every question which can arise as between the receiver, i. e. the Superintendent of Banks, treated as a receiver and persons having claims of any kind or nature against the estate or its assets in the hands of that officer. The officer takes the assets as he finds them. In this case the warrants which the decree of the district Court allowed as a set-off in favor of Plaintiff surety Company, were admitted among the assets so taken over. The $7000.00 of improvement bonds of the Town of Winslow, became assets in the hands of the Superintendent after a partial adjustment of affairs between the bank and the County of Navajo. If the Plaintiff had a claim of any nature connected with those assets, then under the plain provisions of Section 48, of the 1922 Banking Code of Arizona it could and should have presented it to the Superintendent for allowance or rejection. That Section 48, in part reads as follows:

> "The Superintendent of Banks shall cause notice to be given by advertisement in such newspapers as he may direct weekly for eight sonsecutive weeks, calling on all persons who may have claims against it to present the same to him and make legal proof thereof at a place and at a time to be fixed by the Superintendent of Banks. . . If the Superintendent of Banks doubts the justice and validity of any claim he may reject the same. . . . An action upon a claim so rejected must be brought within six months after such service."

There is no allegation nor is there any proof the Plaintiff surety company ever attempted to make legal proof of its claims as asserted in the present Bill.

There is no allegation in the Bill that the provisions of the state banking code of Arizona, fail to provide adequate remedies for adequate relief to plaintiff whatever its claim may have been against the assets, or claim for priority, preference, or what not, it might have. The Bill does not allege that the State Banking law denies Plaintiff any constitutional right, nor does the Bill allege the unconstitutionality of the act itself.

Under this condition and state of the law of Arizona, and the facts as alleged, Appellants again urge that the state has the power to provide for a liquidation of the affairs of its insolvent banks, a power to place the judicial determination of all matters pertaining to such liquidations in the state courts. That when that jurisdiction has attached as it does when the Superintendent takes possession of the property of an insolvent bank, as admittedly done in this case, the jurisdiction of the state court is complete, adequate, and exclusive, to the extent that the Federal Courts have no judicial power to undertake to direct the conduct of the receiver of the state Court as to any matter at all connected, directly or indirectly with the estate of the insolvent bank, claims against it, or the distribution of its assets.

Again we urge that the District Court should have dismissed the Bill upon motion, and erred in

refusing to do so, and erred in rendering the decree which is appealed from in this appeal.

Assignments of error Nos. IV, and XII, Pages 227 and 236, will become so closely connected in any argument directed to the errors therein pointed out, that a presentation of the two assignments together will save prolixity and perhaps avoid confusions.

In connection with these two assignments two points are raised:

(A) That when the legislature in Paragraph 2462, Revised Statutes of Arizona, 1913, Civil Code, provided with respect to county warrants the conditions under which holders of such warrants could use such warrants in payment of debts due the county, that provision became and was a special provision, excluded all other statutes relating to set-offs, and it not appearing that the Bank of Winslow as to any of the warrants was a payee named therein, it nor its subrogee could not use those warrants to liquidate any debt of the bank due the county.

(B) That when the legislature in paragraph 4642 and 4643, of 1913 Civil Code, made provision for depositary bonds, and made the condition of such bonds, "that such bank will promptly pay out to the parties entitled thereto, all public money in its hands, upon lawful demand therefor, and will, whenever required by law, pay over . . to the county treasurer such moneys, with interest as hereinafter provided", the legislature thereby provided in such manner as to exclude any possibility

that any question of any relation of or similar to that of ordinary debtor and creditor could arise as between a county and its depositary bank, and thus excluded any idea that any question of set-off as between those deposits and county warrants held by the bank acquired by it in due course.

(C) That in the two provisions of statute above referred to the state legislature has said in effect, a county will pay its registered warrants at times when same are called for payment, but regardless of any such warrants held by a bank, latter must pay out county money when demanded, except that if the bank is payee named in a warrant it may be used, when accompanied with sufficient money to pay its entire debt to the county. Not otherwise.

The statute as to set-offs in case of county warrants is set out in full in Assignment No. IV, Page 227 of Transcript, and reference is made thereto.

Provision is made in the statutes of Arizona, Civil Code 2440, for the registration of warrants, in cases where the fund upon which those registered warrants is insufficient to pay the particular warrants when presented for payment. These warrants were all registered. It is presumed that the officer did his duty when registering same and that no funds for payment existed in fact. And the set-off ordered by the court ignores the plain law as to time when such warrants become payable, and with that presumption of lack of funds available to pay the particular warrants still applying, the decree of the Court requiring the county to accept warrants drawn upon funds not sufficient, out of depositary

moneys, belonging to other public funds and appropriated for other public county purposes, appears to require the county officers to do unlawful acts.

Upon the propositions above presented, attention is called to citations and cases as follows:

15 Corpus Juris. 605, Sec. 313

15 Corpus Juris 606 Sec. 313,

First National Bank of Garden v. Commrs 52 Pac. 580.

La Forge v. McGee 6 Cal. 285.

15 Corpus Juris 584,

Bartol v. Holmes 41 Pac. 906.

Diggs v. Lobits, 43 Pacific 1069 at 1071

Ostling vs. People, 140 Pac. 173.

Rollins v. Board of Commrs. 199 Fed. 71 at 79.

Stryker v. Board of Commrs. 77 Fed. 567 at 574.

State v. Ownes 56 So. 296.

Forbes v. Bd. of Commrs. 47 Pac. 388.

King Iron Bridge & Mfg. Co. v. Otie Co. 124 U. S. 483.

Talley v. State 180 S. W. 330.

From the above cases it will appear that there exists a difference between "public funds" and "public money", in cases where public warrants are

drawn against and payable from particular funds, as in the case at bar. We quote as follows:—

> "As a general rule orders or warrants against counties can be satisfied only out of the revenue available for the payment of the claims represented by such orders and warrants."
>
> 15 Corpus Juris, 605, Sec. 313.
>
> When the order in which county warrants shall be paid is fixed by statute, it must be followed, it cannot be changed by county boards or courts.
>
> 15 Corpus Juris, 606, Sec. 313, cases in Notes 45 and 46.
>
> "Notwithstanding a judgment has been recovered against a county upon its registered warrants, the amounts due thereon are properly payable in the same order as if such warrants had not been reduced to judgment, out of county funds available for the payment of registered warrants."
>
> First Natl. Bank of Garden v. Comrs. 52 Pac. 580.
>
> "In a number of states express provision is made for the setting apart of special funds for particular purposes. . . Whereas special county funds are authorized, and are in fact raised for particular purposes they must be applied thereto, and cannot be diverted to any other purpose, or transferred to any other fund."

15 Corpus Juris, page 584. Notes 65 and 66, for cases.

"If this could be done, the money belonging to any fund of the county might be taken therefrom, and placed to the credit of a different fund which the commissioners might see fit tot create or designate, and the administration of municipal affairs would be placed in hopeless confusion. (Decision was against any power of transferring money from the fund to which it belonged to a specially created fund.)

Bartob v. Holmes 41 Pacific, 906. (Wash.)

"A person who deals with a municipal corporation deals with it with reference to the law governing such corporation, and is bound by such law. The law providing the means and manner of payment by a municipal corporation is incorporated into and becomes a part of, any cotract between such corporation and any other persor. When the Plaintiff in this case accepted his warrants from the municipal authorities, he took it subject to the conditions and on the terms presented by law for its payment.

Diggs v. Lobitz, 43 Pacific 1089 at p. 1071.

Under a law pertaining to cities and towns, which required the passage of an annual appropriation bill, in which such authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes

for which such appropriations are made, and the amount appropriated for each object or purpose. With other provisions similar to but not as specifically restricting as the provisions of 4839-4842 of Revised Statutes of Arizona as amended in Chapter 52 Laws of 1921. The law provides for registration of warrants, and their payment upon call when funds are in the treasury applicable thereto. In brief from the pleadings and the stipulations of facts the city challenges the right of the realtor to have the funds in the hands of the treasurer, realized and to realized from the revenues for the fiscal year beginning April 1913, applied to payment of such warrant issued prior thereto, and claims the right to use such funds to discharge warrants drawn to meet current expenses for that period. The Court says:—

> As applicable to the facts of this case, the general rule is that a cause of action does not exist against a city upon a warrant *until a fund for its payment has been collected.* Forbes v. Grand County 47 Pac. 388. The fact that the revenues for a particular year are inadequate to meet the warrants for that year, payable out of such revenues, does not render the city liable thereon until a fund which can be applied to their payment, is raised or might have been, in the manner provided by law. . . Persons purchasing warrants take them subject to the mode of payment that the General assembly has provided. Stryker v. Board of Comm'rs of Grand Co. 77 Fed. 567.
>
> Ostling v. People, 140 Pac. 173 at 175-6.

Following and citing Forbes v. Grand County, 47 Pac. 388.

King Iron Bridge Co. v. Otoe Co. 124 U. S. 459.

"Usually warrants purport to be for immediate payment, but where the city or county is in an embarrassed condition such payment cannot be made; and when the legislature provides they shall be paid in the order of registration this is equivalent to inserting in such warrant "Payable at any time when the cash in the fund is sufficient to pay this and all previous presented and registered warrants" and the law fixes the date of payment."

Rollins v. Board of Comm'rs. 199 Fed. 71 at 79 Following 77 Fed. 567.

"But when the laws of a state do prescribe the methods of paying an indebtedness which a municipal corporation has contracted and limit the rate of taxation for that purpose, *such method of payment is exclusive.* No Court has power to vary the mode of payment, or to increase the rate of taxation, although it may be that the means provided by law are defective or insufficient. Persons who become purchasers of the securities of a municipal corporation, whether bonds or warrants, must take notice of any limitations that have been imposed upon the power of taxation for their payment and of the provisions of law that have been to that end. Where some provision has been made to enable a municipal corporation

to discharge its debts, the fact that the provision so made is inadequate, will not authorize a court to devise a different plan, or to compel a larger exercise of the power of taxation. U. S. v. Macon County, 99 U. S. 582.

Stryker v. Board of Commr's 77 Fed. 567 at 574.

"Where special county funds are authorized for a particular purpose they must be applied thereto and cannot be diverted to any other purpose, or be transferred to any other fund."

15 CORPUS JURIS 584.

There is no statutory authority for the use of the term "General Fund" in county taxation. All funds are special in the sense that they may be applied only to such purposes as may be properly embraced therein . . . In making up of the millage to be levied, there may be many miscellaneous or contingent items which can be more conveniently grouped under one heading, but this grouping does not constitute a general fund for all purposes including those for which special levies are made, it yet remains a special fund for such purposes only as may be embraced therein.

State v. Ownes 56 So. 296 (Fla.)

In Colorado the statutes as to presentation of county warrants and payment thereof, or registration thereof to draw interest, are similar to Arizona statutes. In a case of a suit upon registered

warrants to compel payment thereof, the Court says:—

"It is very evident, from these provisions that it was the intention of the legislature to provide for the payment of county warrants, in the order of their presentation, out of a fund to be realized from the levy and collection of the 10 mills provided for general county purposes, and not until such a fund had been collected, and was applicable to the payment of the warrant in its order of presentation, could the holder require payment thereof, and not until such time would any right of action accrue upon such warrant or order against the county, unless, perhaps, the board has been derelict in its duty in levying the amount of taxes authorized. King Iron Bridge & Mfg. Co. v. Otoe County, 124 U. S. 459, Brewer v. Otie County, 1 Neb. 373. The fact that the tax provided proves inadequate to meet such obligations of the county does not render the county liable for their payment in some other manner."

Forbes v. Bd. of Commr's of Grand Co. 47 Pac. 388.

"Whoever deals with a county and takes in payment of his demand a warrant in the character of these. (Registered warrants involved) no time of payment being fixed, does so under the implied agreement that if there are no funds in the treasury out of which it can be satisfied, he will wait until the funds

can be raised in the ordinary mode of collecting such revenues. He is presumed to act with reference to the actual condition of the laws regulating and controlling the business of the county. He cannot be permitted, immediately upon the receipt of such warrant, to resort to the courts to enforce payment by judgment and execution, without regard to the condition of the treasury at the time, or the laws by which the revenues are raised and disbursed." Brewer v. Otie County, 1 Neb. 373, 382, 384. Quoted and followed in,

> Kink Iron Bridge and Mafg. Co. v. County of Otie 124 U. S. 483.

In an Arkansas case, the right of set-off was asserted by sureties upon depositary bond of insolvent depositary bank, on account of warrants held by the bank when failed, the Court says:—

> "The bank held the bridge warrants the same as they had been in the hands of any other holder who merely had the right tto present them to the county treasurer and received payment out of the funds appropriated for that purpose. It appears from the evidence that the depositary had only $100.00 of that fund, which was insufficient to meet the warrants, or, so far as the evidence goes, either one of them. There was, at any rate, no right of set-off; for, even if there had been funds in the county treasury to meet the warrants, the only right the bank had, as the holder of the warrants, was to present them to the treasurer for

> payment in the same manner that any other holder of warrants could have done. The obligation of the bank, as the depositary of public funds, and the sureties on its bond, was to pay the money over on demand, and the failure to pay over the money cannot be justified pro tanto by showing that the depositary was the owner at the time of county warrants.
>
> Talley v. State, 180 S. W. 330.

If it is true as shown by above authorities that the courts have refused to require warrants to be paid out of funds other than those upon which they are drawn. If it is true that persons who take warrants take them subject to the law regulating the time of payment, especially of registered warrants, and the courts have refused to make them payable except when current revenues have been collected to the funds upon which those warrants are drawn sufficient to pay them, then it is true that there was no such mutuality of credits as between the Bank of Winslow and the County of Navajo as would support any application of any rule of equitable set-off in this case. The County trusted the Bank only upon and in accordance with its depositary bond. A bond conditioned "to pay upon demand" all county moneys deposited. The Bank did not purchase the county warrants relying upon the fact that the county had a deposit in the bank, as a means of ultimately paying those warrants. The county in its warrants agreed to pay the holder "when in funds sufficient and available for the purposes for which the warrants were drawn."

The County of Navajo could have demanded every dollar of its deposit from the Bank of Winslow immediately prior to its failure, and if that demand had not been met, could have sued upon its depositary bond, and under the cases the bank could not have "set-off" the registered warrants now in question. The surety, Plaintiff would be in better position than the bank itself in that case.

The Talley case 180 S. W. 330 holds that such a set-off could not be made, in favor of a surety.

The question is, does insolvency change the equities or rather the strict law as applied to maturity and payment of warrants.

We urge that it does not.

The liability of the Plaintiff upon its surety bond was not fixed until the bank became insolvent. It has never in fact paid any amount upon its liability as surety for the bank. Hence it was not a creditor of the bank at the time of its insolvency.

The Arizona Supreme Court in the case of,

Hammons, Supt, of Banks v. U. S. Fidelity & Guaranty Co. 248 Pacific, 1086

says:

> "Surety on depositary bond did not become creditor of depositary until it paid obligees, and that happened after the Superintendent of Banks took charge of the bank as insolvent, it was not entitled, either as subrogee or as assignee to off-set its claim therefor on fidelity bond on which it was surety for the bank's cashier."

We understand the general rule to be that when one of two or sureties commonly or concurrently, for the same principal, has paid then he may pursue the others. We also understand the rule that if a principal hold collateral as security, and is also secured by surety bond for the same debt, if the surety pays, then that surety is entitled to the benefit of the collateral. The converse of that rule is equally true, until the surety does pay, it is immaterial what other security the creditors may have. The payment alon is the step to be taken as the first elemtn necessary in any subrogation in favor of such a surety. In this case that elemtn is absolutely lacking. The Plaintiff has not as yet become a creditor of the Bank, and under the general rule of above case can not avail itself of any right of set off.

The fact must not be overlooked that the very purpose of a depository bond, is to protect the other depositors and creditors of an insolvent bank, from what might have been a preference in favor of public deposits in such banks. This purpose is discussed by the Arizona Supreme Court as follows:—

> "We think the plan for lending and safeguarding public moneys of the state and counties, provided in title 44 Civil Code, supra, in allowing the state to exact security from the depositary, where as no other depositor or patron of the bank is given the same privilege, must have been intended as a substitute for the common law prerogative." (Referring to a possible preference to the public in funds of an insolvent bank.)

As was well said in Smith v. Arnold, 176 S. W. 983: . . The law and sound public policy will not favor preferences in the liquidation of an insolvent bank; and in the absence of statutory provisions to the contrary, we see no reason why the funds deposited in the designated depoistary, in obedience to the statute should stand on any higher ground than the funds of other depositors. It was to protect the funds so deposited that the bond was required of the bank; *and we will not countenance any effort to relieve the bond* by an attempt to obtain a priority in the disbursements of the banks' assets, to the prejudice of the other depositors."

Central Bank of Wilcox v. Lowdermilk.
205 Pacific, at page 916.

"Ky. St. Sec. 4693, requiring state depositaries to give security for public funds, contemplated as such security the indorsements of individuals or a solvent bonding company, and not the pledging of assets of the depositary bank." And a pledge of such assets, to secure the public depositor and the surety upon a depositary bond, was held to be void.

We have pointed out in assignment No. V. (Transcript pages 228, 229, 230, and 231, the provisions of law which permits the Boards of Supervisors to create an expense fund, and therein and therefrom a "salary fund". It has already been pointed out that the expense fund was overdrawn some $47,000.00 at all times during the period of registering of the warrants in question.

That provision contemplates that current expenses, and current salaries be paid in cash. It also provides that when the purpose has been accomplished and there remains an excess in the funds, the Board of Supervisors may by resolution return that excess to the general funds and thereafter same shall be available for redemption of registered warrants in manner provided by law. There is no allegation of any such order having been made, nor any proof thereof. Hence this court may assume that registered "salary warrants" were not yet payable out of any funds in the treasurer's hands, and so were not due for any purpose of this case.

We respectfully submit that for reasons urged above the Appellants are entitled to a judgment of this Court, reversing the decree of the District Court, and dismissing the Plaintiff's Bill of Complaint. Etc., etc.

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